

- SUBJECT:** Allowing local MHMR authorities to assist in competency, jail diversion
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 8 ayes — Hinojosa, Dunnam, Keel, Talton, Garcia, Green, Kitchen, Martinez Fischer
- 0 nays
- 1 absent — Shields
- WITNESSES:** For — Genevieve Hearon, Capacity for Justice; Spencer McClure, Texas Council on Community MHMR Centers; *Registered but did not testify:* Lauralee Harris, Mental Health Association of Tarrant County; Capt. Greg Leveling and Judi Swayne, Denton County MHMR Board of Trustees; Joe Lovelace, National Alliance for the Mentally Ill of Texas; Charles C. Holt, Common Cause of Texas
- Against — William “Rusty” Hubbarth, Justice For All
- BACKGROUND:** Code of Criminal Procedure (CCP), art. 16.22 outlines the procedure for examining and transferring a defendant awaiting trial who is suspected to have a mental illness or to be mentally retarded. A sheriff must notify a magistrate within 72 hours of receiving evidence that gives reasonable cause to believe that a defendant in the sheriff’s custody is mentally ill or mentally retarded. If the magistrate determines that reasonable cause exists, the magistrate must order an examination of the defendant by a disinterested expert experienced and qualified in mental health or mental retardation to determine whether the defendant has a mental illness or is mentally retarded.
- If the defendant does not submit to an examination, the magistrate may order the defendant to custody for the examination for not more than 21 days. The magistrate cannot order the defendant to a facility operated by the Texas Department of Mental Health and Mental Retardation (MHMR) for examination without the consent of the head of the facility. If the defendant remains in the MHMR facility for more than 21 days, the head of the facility must have the defendant transported to the committing court and placed in

the custody of that county's sheriff. The county must reimburse the MHMR facility for the mileage and per-diem expenses of personnel required to transport the defendant.

A written report of the examination must be submitted to the magistrate within 30 days of the exam being ordered, and the magistrate must provide copies of the report to the defense counsel and the prosecuting attorney. The report must describe the procedures used in the exam, the examiner's observations and findings as to whether the defendant has a mental illness or is mentally retarded, and the recommended treatment. After receiving this report, the court may resume criminal proceedings against the defendant or competency proceedings, if required.

Under CCP, art. 17.032(b), a magistrate must release certain mentally ill defendants on personal bond. A personal bond does not require sureties or other security. The magistrate must release the defendant unless good cause not to do so is shown or if all of the following conditions are met:

- ! the defendant is not charged with and has not been convicted previously of a violent offense such as murder, sexual assault, or aggravated robbery;
- ! the defendant is examined by a mental health expert;
- ! the examiner concludes that the defendant has a mental illness or is mentally retarded and is competent to stand trial, and the examiner recommends mental health treatment for the defendant; and
- ! the magistrate determines, in consultation with a local mental health or mental retardation services provider, that appropriate treatment for the defendant is available through MHMR or another provider.

The magistrate must require as a condition of release on personal bond that the defendant submit to mental health or mental retardation treatment if the defendant's illness or retardation is chronic or if the defendant's ability to function independently will continue to deteriorate without treatment.

Health and Safety Code, sec. 534.053 describes the minimum services MHMR must provide for each service area. Sec. 574.034 allows a judge to order temporary inpatient or outpatient mental health services for a proposed patient in certain situations.

**DIGEST:** CSHB 1071 would allow a magistrate to order an examination of a defendant by the local mental health or mental retardation authority (local MHMR) or another disinterested expert. If the defendant did not submit to the examination, the magistrate could order the defendant to submit to an examination in a mental health facility determined to be appropriate by the local MHMR for a reasonable period not to exceed 21 days. The magistrate could order a defendant to an MHMR facility for examination only on request of the local MHMR facility and with the consent of the head of the facility.

The written report of the examination would have to include a finding as to whether the defendant was competent to stand trial.

CSHB 1071 would allow the court, after receiving the examining expert's report, to resume:

- ! criminal proceedings against the defendant, including proceedings related to the defendant's release on personal bond under CCP, art. 17.032; or
- ! competency proceedings, if required, or other proceedings affecting the defendant's receipt of appropriate court-ordered mental health or mental retardation services, including proceedings related to the defendant's receipt of outpatient mental health services.

A magistrate would have to release a defendant on personal bond, unless good cause were shown otherwise, if the defendant met all four conditions described in CCP, art. 17.032(b). Conditions 1 and 3 would not change. The bill would modify Condition 2 to allow the defendant to be examined by the local MHMR or by another mental health expert under CCP, art. 16.22. The bill would modify Condition 4 to allow the magistrate to determine, in consultation with the local MHMR, that appropriate community-based mental health or mental retardation services for the defendant were available through MHMR or another provider.

The magistrate would have to require as a condition of release on personal bond, unless good cause was shown for not requiring treatment, that the defendant submit to outpatient or inpatient treatment as recommended by the local MHMR if the defendant's mental illness or mental retardation was

chronic or if the defendant's ability to function independently would continue to deteriorate without treatment.

This bill would take effect September 1, 2001, and would apply to a defendant charged with an offense committed on or after that date.

**SUPPORTERS  
SAY:**

CSHB 1071 would provide a much-needed process of jail diversion for nonviolent offenders who are mentally ill or mentally retarded. Mechanisms are in place for diverting offenders from jail, but judges and prosecutors often are uncertain about whether an offender should be diverted and to what type of facility or program the offender should be sent. CSHB 1071 would clarify this process.

In a January 2001 report to the Legislature, the Criminal Justice Policy Council recommended that better diversion and treatment efforts be set up to divert mentally ill people from the criminal justice system. The agency estimated that 28,367 mentally ill offenders were in prison or county jails in Texas during fiscal 2000. Often, these offenders end up in jail because of "nuisance crimes" they commit while not taking necessary medication. If they had been diverted to a mental health agency that could have treated their illness, these offenders likely would not have committed the crimes.

This bill would offer judges additional options, such as ordering defendants into a community-based program that could both stabilize and help the defendant and save the state money. Community-based treatment often has the best therapeutic benefit because it helps the person learn to function normally in society.

CSHB 1071 would help judges evaluate defendants and determine the most appropriate placement by encouraging input from local MHMR authorities. Judges should have the best tools available for dealing with defendants with mental retardation or mental illness, and the local MHMR systems could have experience working with these people. For example, the local MHMR authority could have knowledge about the person's background that might not be observable from a court appearance. MHMR could help the judge understand a defendant's true mental state and culpability.

Local MHMR systems experienced in dealing with these defendants could have input in making placement decisions. It is in the best interests of the defendant and the state to make sure that defendants get the most appropriate punishment or treatment so that they do not commit new crimes.

The bill would clarify that judges can request the assistance of a local MHMR authority in determining competency and the need for jail diversion. Although judges now can request MHMR assistance, some are hesitant to do so because the statutes do not define this authority explicitly.

CSHB 1071 would not create a conflict of interest for local MHMR employees who testified in competency hearings. These employees are not determining sentencing, but rather whether the defendant is mentally capable of standing trial. Because this employees often have worked with defendants in the past and have access to medical records, they can give accurate assessments of the defendants' mental capabilities. Also, a judge still would have the option to appoint a disinterested expert to examine the defendant. If judges were concerned about MHMR employees' possible conflicts of interest, they could appoint other experts instead.

This bill would protect public safety. It would not allow defendants charged with or previously convicted of violent crimes to be released on personal bonds.

**OPPONENTS  
SAY:**

CSHB 1071 is unnecessary because judges already can request the assistance of local MHMR authorities in determining competency and the need, if any, for jail diversion. In addition, judges already have the opportunity to sentence defendants to community-based treatment programs.

This bill could allow some mentally ill or mentally retarded people to escape punishment. These people should not be treated leniently if they understand the wrongfulness of their actions and still choose to commit crimes.

Local MHMR authorities would be helpful in determining placement in jail diversion because of their personal knowledge of defendants' illnesses or retardation and the treatment defendants need. However, these authorities are not always well suited to determine a defendant's competency to stand trial, because they often lack experience as expert witnesses and would approach

competency cases from the perspective of a “healer” rather than from a public safety perspective. In addition, employees of local MHMR authorities could be biased by knowing the defendant and would have a conflict of interest because they work for the state.

NOTES:

HB 1071 as filed is identical to the committee substitute, except that it would not have changed CCP, art. 16.22(c).

The companion bill, SB 1383 by Armbrister, has been referred to the Senate Criminal Justice Committee.